ISAIE ADAM (PLAINTIFF) ..... APPELLANT;

AND

DAME MARIE BLANCHE OUELLETTE (DEFENDANT) ..... RESPONDENT;

AND

METROPOLITAN LIFE INSURANCE CO. ..... (MISE-EN-CAUSE).

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*Feb. 26
*May 13

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Insurance (Life)—Will—Joint application for policy by father and son—Son as insured and father as beneficiary—Insured reserving right to substitute beneficiary—Conditions of policy as to change of beneficiary—Whether inserted for benefit of beneficiary or company—Wife of insured substituted as beneficiary by will of insured—Whether father or widow entitled to proceeds of policy—Communication between parties to contract during lifetime of insured—Whether necessary before revocation of beneficiary by testamentary instrument—Articles 1029 and 2591 C.C.

The appellant and his son, then partners, arranged to obtain from the company mise-en-cause a policy of insurance on the son's life for $5,000. The policy was issued upon the joint application of both, the father being mentioned to be the beneficiary. There was a proviso, the father assenting to it, that the son reserved to himself the right to operate at any time a substitution of beneficiary. The policy contained conditions for a clause enumerating change of beneficiary: that it should be effected by notice in writing to the insurance company, with the deposit of the policy in its office, there to be endorsed by the company and that the change would operate only after such endorsement. In 1926, the son obtained two loans from the company on the security of the policy, and the appellant and his son for that purpose transferred to the company the policy, to be returned in reimbursement of the loans. In 1940, the son died and left a will bequeating to his wife all his movables and unmovables, etc., including his insurances. The proceeds of the policy were claimed by the appellant as beneficiary under the policy and by the respondent under the will of her husband. The appellant contended that the substitution of beneficiary had not been effected within the terms of the clause above mentioned and also that there had been already a transfer of the policy to the company as security for the loans. The Superior Court maintained the appellant's action claiming the amount of the policy; but the appellate court reversed that judgment, holding that the right of the insured to change the beneficiary could be exercised by will.

*Present:—Rinfret C.J. and Kerwin, Taschereau, Rand and Estey JJ.

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Held, affirming the judgment appealed from, Rand J. dissenting, that the widow respondent was entitled to recover the proceeds of the policy. The conditions of the policy, which the appellant invoked in support of his contentions, were not inserted therein for his own benefit. The first clause, as to conditions for change of beneficiary, was clearly providing for the protection of the insurance company itself, which alone had the right to invoke it, and quoad the appellant, it was *res inter alias acta.* The second clause has no bearing upon the issue in this case: the transfer of the policy to the insurance company was restricted to the amount of the loans made by it to the insured. The surplus of the proceeds of the policy belonged to the respondent as beneficiary duly substituted by the will of the deceased and could no more be claimed by the appellant who had been legally revoked as beneficiary under the conditions of the policy.

Per Rand J. dissenting:—The policy notwithstanding the power of revocation is a contract for the benefit of a third person within article 1029 C.C., and, in the absence of a rule either of the Code or the prior law, that article leaves untouched, if it does not indeed exclusively contemplate, powers of revocation provided by or inherent in the contract. In the present contract of insurance, as in any other obligation, underlying particular formalities that may be specified, there is assumed a fundamental communication between the parties. As there is no suggestion that the contract here, either expressly or impliedly, contemplates a designation by a testamentary instrument, it must be concluded that a communication between the parties in the lifetime of the insured is a *sine qua non* of such a modification.

APPEAL from the judgment of the Court of King's Bench, Appeal side, Province of Quebec reversing the judgment of the Superior Court, E. Fabre Surveyer J. and dismissing the appellant's action.

The appellant claimed the proceeds of a life insurance policy as beneficiary named in the policy itself; while the respondent based her rights on the fact that her husband, by his will, has left her all his property "including his assurances".

Jacques Cartier K.C. for the appellant.

André Sabourin for the respondent.

The judgment of the Chief Justice and of Kerwin, Taschereau and Estey JJ. was delivered by—

TASCHEREAU J.—L'appelant, demandeur en première instance, réclame le produit d'une police d'assurance dont il prétend être le bénéficiaire. Sa réclamation a été admise par la Cour Supérieure, mais la Cour du Banc du Roi a rejeté son action.

Dans le cours du mois de juillet 1914, la Metropolitan Life Insurance Company, la mise-en-cause, a émis une police d'assurance au montant de $5,000 (vingt paiements), à la demande conjointe de l'appelant Isaïe Adam et de son fils Joseph Ovila Adam. Aux termes mêmes de la police, il est mentionné que le fils est l'assuré, et que le père sera bénéficiaire dans le cas de survie. L'une des clauses les plus importantes de cette police, est qu'avec le consentement du père, le fils s'est réservé le droit de changer de bénéficiaire à son gré, et de déterminer par conséquent toute autre personne de son choix, comme devant recevoir à sa mort le produit de la police. Les conditions relatives au changement de bénéficiaire sont les suivantes:—

> Changement de bénéficiaire:—Lorsqu'on s'est réservé le droit de révocation, l'assuré pourra, pendant que la police est en vigueur, s'il n'a été fait aucun transfert de la police tel que stipulé ci-après, désigner un nouveau bénéficiaire avec ou sans droit réservé de révocation, en déposant un avis par écrit au bureau central de la Compagnie, accompagné de la police pour être endossée en bonne et due forme. Un tel changement prendra effet sur l'endossement dudit avis sur la police par la Compagnie. Si un bénéficiaire quelconque, sous une désignation soit révocable ou irrévocable, meurt avant l'assuré, l'intérêt de ce bénéficiaire reviendra à l'assuré.

Tel que la police le permet, des avances substantielles ont été faites au fils, à même les montants accumulés. Dans le cours du mois de janvier 1940, le fils est décédé après avoir fait un testament, dont la seule clause importante pour déterminer ce litige est la suivante:—

> Je donne et lègue à mon épouse Dame Marie Blanche Ouellette tous les biens, meubles, immeubles, argent, créances y *compris mes assurances et tous* autres biens et droits quelconques que je possèderai au jour et heure de mon décès pour lui appartenir en pleine propriété à compter de mon décès, l'instituant ma légataire universelle en propriété mais à la condition qu'elle garde viduité et sans aucune obligation de faire inventaire ou donner caution.

La compagnie mise-en-cause, requise de payer et par l'appelant qui allègue son titre de bénéficiaire, et par l'épouse du fils qui invoque le testament, a déposé entre les mains du Protonotaire la somme de $3,192.30, montant représentant la valeur de la police, déduction faite des avances, au moment du décès.

La question de savoir si le père, bénéficiaire original, peut être révoqué, ne se présente pas. Evidemment, il s'agit, il est vrai, d'une stipulation en sa faveur, qu'il a

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acceptée, et le fils qui a stipulé ne pourrait la révoquer sans violer les dispositions de l'article 1029 C.C. Mais le bénéficiaire et l'assuré ont tous deux convenu que telle révocation pourrait s'opérer par l'unique volonté du fils. Le seul problème qui se pose alors est donc de savoir si la révocation a été faite légalement.

Il est certain qu'un changement de bénéficiaire peut s'opérer par testament (Arr. 2591 C.C.), et qu'un mari peut attribuer à son épouse les bénéfices d'une police d'assurance (S.R.Q., 1941, ch. 301, art. 3).

Quand dans son testament, le fils dit: "Je donne et lègue à mon pouse * * * y compris mes assurances, etc.," il emploie, je crois, des mots qui ne laissent pas de doute quant à ses intentions, malgré qu'il eût d'autres polices d'assurance. Avant que la compagnie mise-en-cause eût payé, copie du testament lui fut signifiée.

L'appelant soutient que ce changement de bénéficiaire ne satisfait pas les conditions de la clause précitée, parce qu'un avis par écrit n'a pas été déposé au bureau central de la compagnie, accompagné de la police, et parce qu'également il avait déjà eu un transfert de la police à la mise-en-cause pour garantir les avances consenties.

L'appelant semble croire que ces clauses sont insérées dans la police pour son bénéfice à lui, et qu'à défaut par l'assuré de remplir une condition de son contrat avec l'assureur, il aura le droit de s'en prévaloir. Je crois qu'il fait erreur.

La première de ces deux conditions existe clairement pour la protection de la compagnie elle-même. Celle-ci en effet peut seule l'invoquer, mais *quoad* l'appelant, elle est res *inter alias acta*. On conçoit facilement la nécessité d'une pareille clause, et la raison impérieuse pour laquelle l'assureur exige qu'elle soit l'une des conditions de la police. Dans le cas d'exigibilité du montant de la police, c'est le bénéficiaire qui doit recevoir le paiement, et comment la compagnie saurait-elle à qui verser les montants dus, si elle n'était pas protégée par une clause semblable? Mais si l'avis qui lui est donné n'est pas strictement conforme aux termes de la police, ce n'est sûrement pas le bénéficiaire original légalement révoqué, et dont les droits sont totalement éteints, qui peut être admis à se plaindre.

Quant à l'autre condition, à l'effet que l'assuré ne peut changer de bénéficiaire s'il a été fait un transfert de la police, elle ne saurait je crois affecter davantage le résultat de cette cause.

Pour garantir des avances faites à l'assuré, la police a en effet été transférée à la mise-en-cause, mais ce transfert ne vaut que jusqu'à concurrence des montants avancés. C'est la police elle-même qui le dit. Le surplus évidement appartient au nouveau bénéficiaire dûment nommé, et non pas à l'ancien qui est révoqué. Quand la mise-en-cause stipule "qu'aucun transfert ne sera fait", cela signifie que la compagnie n'acceptera pas le transfert tant que les avances n'auront pas été remboursées, mais quand elles le sont, le surplus doit nécessairement être payé au bénéficiaire nouveau, qui se trouve investi de tous les droits éventuels que peuvent conférer les termes de la police.

L'appelant, premier bénéficiaire, n'avait qu'un droit précaire, qui aurait cependant perdu ce caractère pour devenir certain et définitif, si l'assuré était mort avant d'exercer à son gré son droit incontestable de révocation. Ce droit a été exercé dans le testament, et comme conséquence, au moment de l'ouverture de la succession du fils, la révocation et l'attribution à un nouveau bénéficiaire des avantages de la police, se sont simultanément produites.

Je crois que l'appelant ne peut pas réussir, et que son appel doit être rejeté avec dépens de toutes les cours.

RAND J. (dissenting): This is a controversy over the proceeds of a life insurance policy. The appellant was the father of the insured and was the beneficiary named in the policy. The respondent is the widow and claims the money under the will of her deceased husband.

The policy called for the payment of premiums for twenty years, and there were the usual cash surrender rights. The application, signed by both the father and the son, is incorporated in the policy, and contained the following questions and answers:

19. Qui va recevoir le montant de la police postulée à la fin de dotation?

R. Joseph Oliva Adam.

Degré de parenté vis-à-vis de la personne proposée à l'assurance?

R. L'assuré même.

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20. Désirez-vous réserver le droit de changer de bénéficiaire en n'importe quel temps, sans le consentement du bénéficiaire désigné ci-après?

R. Qui.

21. En cas de décès qui sera désigné pour recevoir le montant de la police postulée?

R. Isaïe Adam.

By the policy, the company promised to pay on the death of the insured to the appellant "bénéficiaire avec droit de révocation". Change of beneficiary was dealt with in the following manner:

> Changement de beneficiaire.—Lorsqu'on s'est réservé le droit de révocation, l'assuré pourra, pendant que la police est en vigueur, s'il n'a été fait aucun transfert de la police tel que stipulé ci-après, désigner un nouveau bénéficiaire avec ou sans droit réservé de révocation, en déposant un avis par écrit au bureau central de la Compagnie, accompagné de la police pour être endossée en bonne et due forme. Un tel changement prendra effet sur l'endossement dudit avis sur la police par la Compagnie. Si un bénéficiaire quelconque, sous une désignation soit révocable ou irrévocable, meurt avant l'assuré, l'intérêt de ce bénéficiaire reviendra à l'assuré.

Provision was made also, after the insurance had been three years in force, to make loans up to 85 per cent of the cash surrender value, "sur transfert et de la remise valable de la police". Two loans were so made by the insured and his interest in the policy was as required assigned to the company by a document to which the beneficiary likewise was a party. These loans remained unpaid at the time of death.

The language of the will which is said to carry the funds to the respondent is this:

> tous les biens, meubles, immeubles, argent, *créances y compris mes assurances* et tous autres biens, etc.

It is contended that this language is not appropriate to a change of beneficiary, and that it applies rather to insurance payable to the estate of the deceased, of which there were several policies. But for the purpose of the conclusion to which I have come, I will assume the will to purport to substitute the wife for the father as beneficiary, and as no statutory provision is applicable, the question is whether that change has been brought about.

The judgment at trial holding against the respondent was reversed on appeal, on the ground that the power to change the beneficiary could be exercised by will. The

clause providing the mode for such a change was treated as for the benefit only of the insurer, which the designated beneficiary had no standing to invoke. In the language of Barclay J.:

> Such a clause was inserted for the protection of the company, and was not intended to confer different rights or more extensive rights upon the beneficiary than he had under the terms of the application. Being of that opinion, I consider that the policy with the stipulated right to revoke at any time was and always remained in the "patrimoine" of the deceased, the assured, and that he could and did validly change the beneficiary by the terms of his will.

The essence of this holding lies in the last four lines, and the decisive question is, what is the legal effect in the circumstances of the language in the policy "bénéficiaire avec droit de révocation".

The consideration of this question must, I think, start with the fact that the policy notwithstanding the power of revocation is a contract for the benefit of a third person within article 1029 of the Civil Code:

> A party in like manner may stipulate for the benefit of a third person, when such is the condition which he makes to another; and he who makes the stipulation cannot revoke it, if the third person has signified his assent to it,

as interpreted by this Court in *Hallé* vs. *Canadian Indemnity Company* (1). The Article, by its declaration of the effect of assent, does not assume or imply any particular mode of revocation; but as the matter is in contract, in the absence of a rule either of the Civil Code or the prior law, the Article leaves untouched, if it does not indeed exclusively contemplate, powers of revocation provided by or inherent in the contract. The designation of a third person, subject to revocation, none the less fixes pro tempore the issue or object of the benefit; and the question becomes whether assent adds anything to the legal relation of the beneficiary to the obligation.

To treat the interest of the policy as simply augmenting the patrimoine of the insured, which is in fact to take the contract out of article 1029 C.C., lends itself to a confusion of two conceptions of transfer, that of alienation or transmission and that of a designation that completes a special form of obligation. If the policy should provide for the payment of moneys to the estate of the insured, the contract is not one within article 1029 C.C. because no

(1) [1937] S.C.R. 368.

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third person within the meaning of the Article is involved. In such case, the appropriation of that interest by will takes effect as a testamentary transmission of property of the testator: but a person taking by way of designation in the policy, takes as a party to a contract.

Can a will co-exising with a policy naming a beneficiary change that beneficiary? If the designation remains unrevoked, by the effect of the contract the obligation at the moment of death matures. Conceiving the insurance to be within the patrimoine, a will purporting to deal with it and operating as a transmission becomes effective at the same instant. It is not suggested that the execution of the will itself revokes the designation, and we have both instruments therefore approaching the same moment at which they both become accomplished. Does the will override the contract? During the time of that parallel currency, what is the interest of the beneficiary? If he has any at all, how can it be said that the benefit of the insurance is within the patrimoine? If the power to revoke is all the testator holds, then it is a question not of transmission of patrimoine, but of designation for the purposes of a contract.

To the policy, the application of Article 1029 C.C. must I think be given some effect following the assent of the beneficiary. On the view of the Court below, that assent is of no significance; the relation of the beneficiary after is precisely the same as before. The contract ought, then, to be construed with the Article as creating a right in the beneficiary which is subject to revocation only by way of a modification of the contract. In other words, the parties to the contract have reserved to themselves as parties the right to modify the benefit which otherwise would be irrevocable in the third person. But only to that extent is the right of the beneficiary made precarious.

How then is a contract or obligation changed by the parties? What is the minimum of act or matter by which it can be said the contract has been modified? For that we must look to the contract itself. Here, as in any other obligation, underlying particular formalities that may be specified, there is assumed a fundamental communication between the parties. They may, of course, agree in advance that any act by either party may signify a change in some

feature of the obligation: but in one form or another there must be agreement between them. The company could obviously waive any particular requirements stipulated for its protection, but the essential fact remains that the change must be effected by agreement. As there is no suggestion that the contract here, either expressly or impliedly, contemplates a designation by a testamentary instrument, we are bound to conclude that a communication between the parties in the lifetime of the insured is a sine qua non of such a modification.

Article 2591 C.C. does not appear to have any bearing upon the question raised. Its language is:

> A policy of insurance on life or health may pass by transfer, will, or succession, to any person, whether he has an insurable interest or not in the life of the person insured.

The subject matter there is insurance for the benefit of the insured, an interest within his patrimoine, and the Article renders it subject to those modes of transfer or transmission which apply to the patrimoine generally. But it must be interpreted and reconciled with article 1029 C.C, and where a contract has created a right in a third person, that right takes the benefit of the insurance outside the scope of article 2591 C.C.

I would, therefore, allow the appeal and restore the judgment of the Superior Court with costs throughout.

Appeal dismissed with costs.

Solicitor for the appellant: *Jacques Cartier K.C.*

Solicitor for the respondent: *Ivan Sabourin.*